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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/646,979	08/22/2003	Ann Louise McCormack	19615	1058

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EXAMINER

MATZEK, MATTHEW D

ART UNIT PAPER NUMBER

1771

DATE MAILED: 04/20/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 10/646,979	Applicant(s) MCCORMACK ET AL.	
	Examiner Matthew D. Matzek	Art Unit 1771	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 18 January 2006.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-30 is/are pending in the application.
- 4a) Of the above claim(s) 28-30 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-27 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 22 August 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

Response to Amendment

1. The Amendment dated 1/18/2006 has been fully considered and entered into the Record. Claims 1-30 are currently pending, but claims 28-30 have been withdrawn from consideration. Amended claims 1, 6 and 23 contain no new matter. The rejection of claims 1 and 23 under 35 U.S.C. § 112 2nd paragraph have been withdrawn due to amendment. The rejection of claims 1-27 under 35 U.S.C. § 102 (b) in view of Haffner et al. has been withdrawn as the applied reference fails to teach an ethylene copolymer having a density between 0.900 and 0.915 and a melt index of 6 and a different ethylene polymer or copolymer having a density of at least 0.003 g/cm³ greater than that of the letdown resin.

Claim Objections

2. Claim 1 is objected to because of the following informalities: MVTR must be written out as its full term and melt index does not have any units. Examiner interprets the melt index to have units of g/10 min as recited in claim 5.
3. Claim 24 is objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claim(s), or amend the claim(s) to place the claim(s) in proper dependent form, or rewrite the claim(s) in independent form. Claim 24 is not further limiting as its independent claim (claim 1) limits the density of the carrier resin to be at least 0.918 g/cc ($0.915 + 0.003 = 0.918$).

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

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4. Claim 2 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 2 limits the density of the letdown resin to be less than 0.913 g/cc, which allows for any density less than 0.900 g/cc. However claim 1 has already limited the letdown resin density to be between 0.915-0.900 g/cc. Therefore, the limitation of letdown resin density of claim 2 contradicts that of its independent claim.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

5. Claims 1-27 are rejected by 35 U.S.C. 103 (a) as obvious over Haffner et al. (US 6,045,900) as further evidenced by Morman et al. (WO 01/83599 A1).

a. Haffner et al. teach a breathable barrier comprising a film layer comprising a filled film comprising about 50 to 70% calcium carbonate (col. 8, lines 23-25) and ethylene polymer (Abstract) and another layer comprising a nonwoven, spunbonded or bonded carded web layer (col. 3, lines 50-52). The laminate has a WVTR (MVTR) of more than 1500 g/m²/day (col. 3, lines 34-37). Example 1 teaches the use of calcium carbonate (filler), LLDPE [carrier resin] (density of 0.918 g/cm³ and a melt index of 3.5 g/10 min) and a LDPE [letdown resin] (density of 0.916 g/cm³ and a melt index of 12 g/10 min). Examiner takes the position that the filler is necessarily contained within the carrier resin phase as the filler is mixed with the carrier resin and then formed into a layer. The applied reference is silent as to the use of an ethylene polymer or copolymer having a density of at least 0.003 g/cm³ greater than that of the letdown resin.

- b. It would have been obvious to one having ordinary skill in the art at the time the invention was made to have used ethylene polymer or copolymer having a density of at least 0.003 g/cm^3 greater than that of the letdown resin in the article of Haffner et al. since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 105 USPQ 233.
- c. Claim 2 is rejected as the reference teaches the use of a polyethylene polymer (letdown resin) having a density ranging from about 0.90 to about 0.95 g/m^2 (col. 10, lines 5-11). The basis weight of the film layer desirable ranges from 15 - 35 g/m^2 (col. 10, lines 59-64). An extensive list of ethylene (polyolefin) polymers has been disclosed including linear low-density polyethylene (LLDPE) (col. 7, line 49 – col. 8, line 8). The nonwoven layer may comprise spunbonded and bonded carded webs (col. 3, lines 46-52).
- d. Claims 17 and 18 are rejected as the nonwoven woven layer may comprise multilayer nonwoven laminates (col. 11, lines 4-10). Claims 19 and 20 are rejected as the film layer may comprise multiple layers **12** (Fig. 1). Haffner et al. teach a WVTR in excess of $1500 \text{ g/m}^2/\text{day}$. This anticipates the breathability of instant claim 23. Claim 25 is rejected as the base layer **14** comprises from about 50% to about 98% of the multilayer film thickness (col. 10, lines 66-67). Claims 26 and 27 are rejected as the breathable barrier of Haffner et al. may be used in garments and personal care products (col. 1, lines 14-17).
- e. It is noted herein that the teachings of Haffner et al. include WVTR in excess of $1500 \text{ g/m}^2/\text{day}$. It is the Examiner's interpretation that such a teaching encompasses the

ranges of 5,000 and 10,000 g/m²/day as claimed herein. The use of material with high WVTR is recognized in the art of breathable barriers as it is evidenced herein by Haffner et al. As evidenced by Morman et al. it is well known to have breathable laminates for use in personal and personal care garments that have MVTR. The larger the WVTR value the greater the ability for the article to allow water vapor to be expelled from the article. This is highly desirable as the article is intentionally created for its breathability.

f. Although Haffner et al. does not explicitly teach the claimed melt indices of claims 5 and 6 or the break strain in the cross direction, it is reasonable to presume that said properties are inherent to Haffner et al. Support for said presumption is found in the use of like materials (i.e. a breathable laminate comprising the instantly claimed polyolefins with the instantly claimed densities). The burden is upon Applicant to prove otherwise. *In re Fitzgerald* 205 USPQ 594. In addition, the presently claimed properties of the claimed melt indices or the break strain in the cross direction would obviously have been present one the Haffner et al. product is provided. Reliance upon inherency is not improper even though rejection is based on Section 103 instead of Section 102. *In re Skoner, et al.* (CCPA) 186 USPQ 80.

Double Patenting

6. Claims 1-27 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-50 of copending Application No. 10/703,761. Although the conflicting claims are not identical, they are not patentably distinct from each other because both articles are directed to breathable laminates of polyethylene with common densities and melt indices.

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7. Claims 1-27 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-51 of copending Application No. 10/335,244. Although the conflicting claims are not identical, they are not patentably distinct from each other because both articles are directed to breathable laminates of polyethylene with common densities and melt indices.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Response to Arguments

8. Applicant's arguments with respect to claims 1-27 have been considered but are moot in view of the new ground(s) of rejection. The previously applied art rejection was applied under 35 U.S.C. § 102/103 and the new rejection has applied only under 35 USC § 103. The rejections set forth in this Office Action address the new limitations set forth in the set of amended claims dated 1/18/2006.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37

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CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

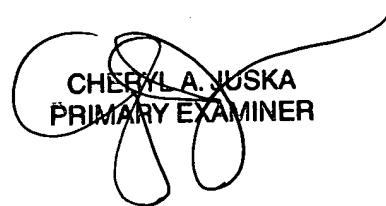
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Matthew D. Matzek whose telephone number is (571) 272-2423. The examiner can normally be reached on 8:30 am - 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel Morris can be reached on (571) 272-1478. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

mdm

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CHERYL A. JUSKA
PRIMARY EXAMINER